

# ALTERING THE COMMON ELEMENTS

- The Act creates 8 new procedures to permit alterations to the common elements, these are:
  - (i) **Substantial Changes:** A substantial change, alteration or improvement to the common elements, a change in assets, or change in a service provided to the owners by the corporation will require the approval of owners representing 66-2/3% of all the units within the complex. There is no right for dissenters to require the corporation to purchase their units at fair market value. The term “substantial” is defined to mean any alteration the cost of which will exceed 10% of the corporation’s budget for the fiscal year in which the vote was held to approve of the change s.97 (6).
  - (ii) **Changes Made by a Corporation Without Notice to Owners:** Changes or alterations which involve an expenditure of the greater of \$1,000.00 in any given month or 1% of the total annual budget may be made by the corporation by resolution of the board without and notice to the owners, s.97 (2)(c).
  - (iii) **Changes Made by the Corporation with Notice:** Non-substantial alterations or improvements to the common elements may be made by the corporation upon resolution of the board of directors subject to providing 30 days written notice to the owners. The notice must describe the proposed alteration, its estimated cost, how it will be paid for and advise the owners they have the right to requisition a meeting to discuss and/or object to the alteration. If owners representing 15% or more of the units requisition a meeting within 30 days of the notice, the alteration cannot proceed until the meeting is called, the matter is voted upon and either approved or rejected, s.97 (3).
  - (iv) **Changes to Common Elements Made by Unit Owners:** An alteration proposed to the common elements by an owner may be approved by a resolution of the board of directors without the necessity of a vote by the owners, s.98 (1), subject to:
    - (a) the owner executing and returning to the corporation a (“section 98”) agreement which must be registered on title to the unit (at the owner’s cost) before the alteration may be made by the owner; and
    - (b) the corporation giving 30 days notice to the other owners of the proposed alteration in the same manner as it would if it were making the alteration itself (s.97) and the notice must contain a copy of the section 98 agreement.
  - (v) **Changes to the Exclusive Use Common Elements Made by Owners:** If a unit owner wishes to make an alteration to an exclusive use common element area allocated to the owner’s unit in the declaration the same procedures as set out above for changes to the common elements made by owners will apply but the corporation does not have to give 30 days notice to other owners, s.98 (2). Before giving consent the board must be satisfied that:
    - (a) the alteration won’t have an adverse effect on the units belonging to other owners;
    - (b) there will be no expense incurred by the corporation;
    - (c) it will not detract from the appearance of the buildings;
    - (d) if the alteration involves a change to the structure of the building an engineer must certify that it will not affect the structural integrity of the building;
    - (e) the alteration will not contravene a provision found in the corporation’s declaration, bylaws or rules, O. Reg. 48/01 s.25 (2) or in the Regulations to the Act; and
    - (f) it will not have an adverse effect on the rest of the common elements, O. Reg. 48/01 s. 25(2).
  - (vi) **Changes Required by Law:** Where the alteration is required to conform with a law, regulation or by-law or where the change is made in accordance with the requirements of a Mutual Use Agreement, neither the consent of or notice to, the owners is required (ie. installing devices to make the building accessible for the physically challenged), s.97 (2) (a).



SimpsonWigle  
LAW LLP

**Hamilton Office**

1 Hunter Street East, Suite 200  
HAMILTON, Ontario  
L8N 3W1  
Tel (905) 528-8411 Fax (905) 528-9008

**Burlington Office**

390 Brant Street, Suite 501  
BURLINGTON, Ontario  
L7R 4J4  
Tel (905) 639-1052 Fax (905) 333-3960

**CONTACT MARIA DURDAN @ EXT. 305 OR [durdanm@simpsonwigle.com](mailto:durdanm@simpsonwigle.com) FROM OUR CONDOMINIUM GROUP FOR FURTHER ASSISTANCE**

*The Condominium Group gratefully acknowledges the contributions of the originator of this guide, the late Ronald S. Danks.*

- (vii) **Changes Required to Conform with Standard Building Practice:** Where modern materials are used to fulfill the obligation to maintain, repair and replace the common elements, the corporation does not have to get the owners approval or send notice to them provided the materials are as reasonably close in quality to the original as is appropriate in accordance with current building practice (the engineer's report should reflect this), s.97 (1).
- (viii) **Changes Required for the Security of the Owners or Property:** Where the alteration enhances the safety or security of the persons using the property or is needed to prevent imminent damage to the property no vote of the owners is required and the corporation does not have to send notice to the owners in advance (ie. adding more security cameras or lighting to the underground garage to deal with an increase in break-ins), s.97 (2) (b).

### **Section 98 Agreements (also referred to as Indemnity Agreements)**

- The section 98 agreement referred to above can contain provisions respecting the allocation of cost of the proposed improvement as between the corporation and the owner and the duties and responsibilities as between the corporation and the owner in respect of repair of the improvement, its ongoing maintenance and the cost of insuring s.98 (1) (b)
- The section 98 agreement must specify who will own the improvement, O. Reg. 48/01, s.25(1)
- The section 98 agreement could be drafted to include more than one improvement provided they were each clearly described
- These agreements must be registered on the title to the unit before the work can commence, s.98 (3)
- Once registered, this agreement is binding upon future owners/mortgagees of the unit, s.98 (5)
- Status certificates must disclose the existence of a section 98 agreement, include a copy of it and include a statement that the agreement has been complied with, "*to the best of the corporation's information, knowledge and belief*", O. Reg. 48/01, Form 13
- Section 98 agreements must be very carefully drawn to ensure, among other things, that:
  - (i) they include any fees that may be charged under the agreement (ie. insurance premiums);
  - (ii) they provide for rights of access for the corporation over, through or under the alteration;
  - (iii) they contain an indemnification protecting the corporation against any costs that may be incurred as a result of the improvements;
  - (iv) the alteration is adequately described; and
  - (v) that the agreement terminates upon the sale of the unit if it is appropriate to do so.
- Any disagreement relating to a section 98 agreement between the corporation and the unit owner must be submitted to mediation/arbitration, s.32 (2) (3)

NOTE: section 98 agreements should only be entered into with the actual owner of the unit, not a tenant or other occupant